bulk of its business,[18] and make impossible the enjoining of its orders by the Federal courts.[19] Conceding the limits of the third class to be broad and ill-defined, it is not clear how a commission rate order is to be brought within its purview, since the commission's action is in no accurate sense the settlement of a controversy under existing law. It is rather an investigation of the facts, as a legislative inquiry, with a view to the promulgation of a new rule for the future,—the order, when issued, taking its character and effect from the legislature.[20] While the New York case turns in part upon a construction of the statute,[21] it relies mainly on decisions rendered under the old Gas and Railroad Commission Statutes. The few of these that are rate cases, it is submitted, are distinguishable in that under these statutes there was no provision for rehearing, the commission's orders were appealable directly to the Appellate Division—thus assuming a judicial record[22]—and until such appeal was perfected the order was not enforcible.[23] The present statute, on the other hand, in allowing rehearings,[24] negatives the idea of a determination of a controversy. It does not provide for an appeal from the order, but merely for collateral attack, and the order is, like a statute, self-enforcing.[25]

The rate-making power, then, is properly to be regarded as legislative.[26] Whether a commission in fixing rates is performing a delegated legislative function or an administrative one is an open question. Whatever may be said in support of the former alternative,[27] the latter is conceived to be preferable as the spirit of our constitutions and theory of government, as well as the great weight of authority, are clearly opposed to the delegation of purely legislative powers.[28] This difficulty disappears by regarding the commission as vested not with the legislative prerogative, but merely with the administrative duty of examining the facts to ascertain what the reasonable rate is, which the legislature, and not the commission, has determined shall be established.[29]

CONTRACTS WITH MONOPOLIES AND *Par Delictum*.—While admitting the unenforcibility of contracts in themselves in restraint of trade or tending toward monopoly, the courts have been reluctant to refuse performance of contracts only remotely connected with the illegal purpose. Leases of property made to a corporation known to be unlawful are upheld.[1] And, though the refusal to enforce the contracts of an unlawful combination to sell the

[18]See Norwalk St. Ry. Co.'s Appeal (1897) 69 Conn. 576.

[19]Under U. S. Comp. Stat. § 720.

[20]Mayor *et al. v.* Knoxville Water Co. (1909) 29 Sup. Ct. Rep. 148.

[21]See opinion below, (1908) 113 N. Y. Sup. 861.

[22]See Vil. of Saratoga Spgs. *v.* Saratoga Gas Co., *supra*, at p. 148.

[23]R. R. Law §§ 59, 161, 162.

[24]Pub. Ser. Com. Law § 22.

[25]Pub. Ser. Com. Law §§ 59, 56.

[26]Telegraph Co. *v.* Myatt (1899) 98 Fed. 335; Reagan *v.* Loan & Trust Co. (1893) 154 U. S. 362; Steenerson *v.* Gt. No. Ry. Co. (1897) 69 Minn. 353; Neb. Tel. Co. *v.* State (1898) 55 Neb. 627; see Note 10, *supra*.

[27]See 7 COLUMBIA LAW REVIEW 61; 8 *Idem* 317; 21 Harv. L. Rev. 205.

[28]Cooley, Const. Limits. (7th Ed.) 163; O'Neil *v.* Ins. Co. (1895) 166 Pa. St. 72; see Field *v.* Clark (1891) 143 U. S. 649; *In re* Kollock (1897) 165 U. S. 526.

[29]See Express Co. *v.* R. R. (1892) 111 N. C. 463; Ga. R. R. *v.* Smith *et al.* (1883) 70 Ga. 694; State *v.* Briggs (1904) 45 Ore. 366; *In re* Thompson (1904) 36 Wash. 377.

[1]7 COLUMBIA LAW REVIEW 618.

article monopolized might find some support on the ground that their recognition would enable the combination to reap the profits of its illegality,[2] and state statutes declaring such contracts void are not infrequent,[3] the Federal courts have declined to apply the doctrine of illegality to that extent.[4] A new step is taken, however, in the recent case of *Continental Wall Paper Co.* v. *Voight & Sons Co.* (1909) 29 Sup. Ct. Rep. 280, in which the Supreme Court has decided that a monopoly, illegal under the Anti-Trust Act, could not recover the purchase price of wall paper sold to a jobber who had previously contracted to buy from the trust only, and to keep up prices.

The decision involves a repudiation of the test usually stated by the Supreme Court,[5] though not always adhered to,[6] that, if the contract is supported by an independent consideration, it will be enforced, or, as the rule is sometimes put, if the plaintiff can make out his case without relying on the illegality.[7] Both tests, however, are often disregarded, on the one hand by cases that allow recovery despite the illegality,[8] and, on the other, by decisions which deny recovery when illegality is not a necessary element in the plaintiff's case.[9] The courts do not in practice adhere to technical rules, but seem to balance, sometimes unconsciously, the apparent injustice of the defendant's enrichment at the plaintiff's expense and the importance of sustaining contractual obligations, against the desirability of discouraging the illegal transaction. Hence, the validity of contracts in themselves legal, but connected with an unlawful act, depends both upon the closeness of the association thereto of the contract or of the parties, and upon the turpitude of the offense. From the latter standpoint, distinctions are drawn between acts *mala in se* and *mala prohibita,* and between offenses against the public and against individuals.[10] Similarly, policies of insurance on illegal voyages are enforced if the illegality consists in a mere breach of the registry laws,[11] but not if it consists in a violation of revenue laws or embargo acts.[12] While broadly it may be said that, if the illegal act is the inducement to the formation of the contract, a sufficient degree of connection exists,[13] this test is not all inclusive. Thus the vendor's recovery of the price of goods which he knows the vendee intends to put to an illegal use may depend on whether he actively aided the vendee in his illegal design, as, for example, by giving false invoices in aid of the vendee's smuggling venture.[14] It may depend upon the vendor's approval of, or

[2]Cf. Ralston *v.* Boady (1856) 20 Ga. 449; Pearce *v.* Brooks (1866) L. R. 1 Exch. 213; but see Prof. Canfield, 9 COLUMBIA LAW REVIEW 97-99.

[3]Heim Brewing Co. *v.* Bellinger (1902) 97 Mo. App. 64; Barton *v.* Mulvane (1898) 59 Kan. 213.

[4]Connolly *v.* Union Sewer Pipe Co. (1901) 184 U. S. 540; Dennehy *v.* McNulta (1898) 86 Fed. 825; The Charles E. Wisewall (1898) 86 Fed. 671.

[5]Armstrong *v.* Toler (1826) 11 Wheat. 258; Embrey *v.* Jemison (1889) 131 U. S. 336, 348; Connolly *v.* Union Sewer Pipe Co., *supra.*

[6]Hanauer *v.* Doane (1870) 12 Wall. 342.

[7]9 Cyc. 556.

[8]Mittelberger *v.* Cooke (1873) 18 Wall. 421.

[9]Kelly *v.* Home Ins. Co. (1867) 97 Mass. 288; cases cited in Notes 14 and 15, *infra.*

[10]Hanauer *v.* Doane, *supra;* M'Mullen *v.* Hofman (1899) 174 U. S. 638.

[11]Ocean Ins. Co. *v.* Polleys (1839) 13 Pet. 157.

[12]Gray *v.* Sims (1814) Fed. Cas. No. 5729.

[13]7 COLUMBIA LAW REVIEW 416.

[14]Kohn *v.* Melcher (1880) 43 Fed. 641; and see Arnot *v.* Pittston etc. Coal Co. (1877) 68 N. Y. 558.

certainty of, the illegality of the vendee's purposes.[15] Similar considerations seem to underlie the distinction drawn by the courts between sales of houses to be used for immoral purposes, which are enforced in the United States,[16] and leases for the same purposes, which are declared void.[17] The line of demarcation is concededly vague.[18]

The connection found by the majority in the principal case—and this was the ostensible ground of decision—was that the sale of the article monopolized was designed to carry out the provisions of the previous unlawful contract. Although it is sometimes said that a contract to carry out an unlawful contract is itself illegal, the cases cited may be distinguished in that the second contract was merely a modified restatement of the first,[19] intended to accomplish the same purpose, or a new contract, even with an independent consideration, to bind the performance of an unexecuted term of the first,[20] or by way of security for its fullfilment.[21] Moreover, the universal validity of the principle is discredited by the present practice of allowing recovery of money that was loaned to enable the borrower to pay losses under an illegal contract.[22] In the principal case, the defendant was not bound by the original contract to buy from the monopoly, nor did his purchase in any way secure the performance of its terms. The distinction drawn by the court, in seeking to reconcile the *Connolly* case,[4] between illegality to which the plaintiff only was party and that in which the defendant also participated, is sound, provided the terms used are properly defined.[23] But its application is hardly sustainable by analogy to cases in which one party to an illegal transaction attempts to recover his share of the profits.[24] And it is fundamental that prior unlawful dealings between the parties will not invalidate subsequent independent transactions.[25] The decision is, it is submitted, really based on the belief that the type of manufacturers' trust that is strengthened by securing the exclusive patronage of the important dealers and their agreement to keep up prices is "more certain, more widespread in its operation, and more eager in its purposes"[26] than the ordinary trust and that although "the policy of not furthering the purposes of the trust is" (in general) "less important than the policy of preventing people from getting other people's property for nothing when they purport to be buying it,"[27] the reverse is true of this particularly obnoxious form of trust, despite the tenuity of the connection between the contracts.

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[15]Graves *v.* Johnson (1892) 156 Mass. 211; s. c. (1901) 179 Mass. 53.

[16]Sprague *v.* Rooney (1886) 82 Mo. 493.

[17]Ralston *v.* Boady, *supra*; and see 2 Taylor, Landl. & Ten. (9th Ed.) 527.

[18]Graves *v.* Johnson, *supra*.

[19]Webster *v.* Runnels (Ill. 1880) 7 Bradw. 560, cited in 15 A. & E. Encyc. 994.

[20]Gray *v.* Hook (1851) 4 N. Y. 449; Barton *v.* Port Jackson etc. Road Co. (N. Y. 1854) 17 Barb. 397; Shelton *v.* Marshall (1856) 16 Tex. 344; cited in 9 Cyc. 562.

[21]Cannan *v.* Bryce (1819) 3 B. & Ald. 179, cited in Anson, Contracts (11th Ed.) 257.

[22]Armstrong *v.* Bank (1889) 133 U. S. 433, 469.

[23]See Armstrong *v.* Toler, *supra*; Graves *v.* Johnson, *supra*.

[24]M'Mullen *v.* Hofman, *supra*; Thaliner *v.* Brinkerhoff (N. Y. 1823) 20 Johns. 386.

[25]7 COLUMBIA LAW REVIEW 416.

[26]*Per* Harlan, J.

[27]Holmes, J., dissenting.